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ABSTRACT

Experts agree that the U.S. criminal justice system faces a crisis, yet there is a broad range of views as to its sources, consequences, and solutions. There seems to be a public perception that the individual rights guaranteed accused criminals by the U.S. Constitution prevents the criminal justice system from functioning properly. It is generally accepted among persons involved in the legal system, however, that constitutional rights are not undermining the system. Most experts believe that one of the greatest challenges facing the criminal justice system is the nation's illegal drug problem. Yet there is much disagreement as to how much attention and spending should be devoted to law enforcement as opposed to education. One inescapable fact is that a lack of funds has weakened the justice system. Prosecutors, public defense attorneys, and courts are overwhelmed and generally underpaid. Jails and prisons are terribly overcrowded. Many experts feel that it is important that the public come to understand that the criminal justice system has a limited role in reducing crime. People must begin to see that the crime problem, whether related to drugs or not, is a societal problem that has its roots in both economic status imbalance and a weakened moral system. (DB)

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American Bar association
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Bulletin

American Bar Association ABA *Special Committee on Youth Education for Citizenship*

Confronting the Crisis in the Criminal Justice System

by Sara Podell

America has a crime problem and an overwhelming drug problem. The result is overburdened courts, overworked prosecutors and defense attorneys, and insufficient prison space. The American public recognizes these individual realities, but what it may not recognize is that these facts together have produced a crisis in the criminal justice system. Experts from diverse fields have examined this crisis, both its components and its whole. However, their analyses of its sources, consequences, and solutions often diverge.

Does the Bill of Rights Undermine the Criminal Justice System?

In looking at any problem, the natural tendency is to pinpoint one particular cause and fix it. While attractive, this type of approach is always dangerous. Quick fixes usually don't work, and a quick fix is particularly unlikely to solve the complex problems of the criminal justice system.

In 1986, the American Bar Association Section on Criminal Justice created a committee to examine how well the criminal justice system was working and to identify how to improve it. The Special Committee on Criminal Justice in a Free Society was chaired by Samuel Dash, former Philadelphia district attorney and a former chairperson of the ABA Criminal Justice Section, who is perhaps best known for his service as chief counsel to the Senate Watergate Committee. He is now a law professor at Georgetown University in Washington, DC. The committee produced a report, ***Criminal Justice in Crisis,*** which carefully examined the perception that the individual protections of the Fourth, Fifth and Sixth Amendments to the Constitution prevent the criminal justice system from functioning properly.

By surveying police chiefs, district attorneys, defense attorneys and judges—the people at the "front lines"—the committee concluded that constitutional guarantees are not handcuffing law enforcement. It emphasized the grave error of scapegoating constitutional protections and scrapping them as part of a "get tough on crime" program. A police lieutenant explains, for example, that the *Miranda* warnings are "a routine. [Arrestees have] been through it. We've been through it . . . . It doesn't, frankly, interfere too much with confessions, surprisingly enough." (***Criminal Justice in Crisis,*** pp. 28-29) A trial judge states, "It's very rare that confessions are kicked out in court . . . . Essentially, I think that the Fourth and Fifth Amendments have really made the police officers better police officers because they have to be smarter police officers." A prosecuting attorney concurs, explaining that a "good police officer [could talk defendants into confessing before or after] there was a *Miranda* . . . .and so [the decision] had no real impact at all upon the ability of good police officers to get confessions." (***Criminal Justice in Crisis,*** p. 31)

Dash and Sharon Goretsky, a consultant to the ABA Section of Criminal Justice, comment that "[some] politicians use the Bill of Rights as a scapegoat for their own failure to address the crime problem honestly. (Dash and Goretsky, "We Don't Need to Give Up Our Constitutional Protections," ***Criminal Justice,*** Vol. 5, No. 1, p. 3) Dash, Goretsky and many other analysts are careful to point out that the crucial task is to face the crime problem in all its complexity. Convincing the American public that sacrificing their constitutional protections will save the system can only make situations worse. "Out of 34 million serious felonies . . . in 1985, 31 million never got into the criminal justice system because they were unreported, or if reported, they remained unsolved." (Dash and Goretsky, p. 3) If, as these figures indicate, 90% of felonies never enter the system at all, the Fourth, Fifth and Sixth Amendments' protection of individuals at the time of arrest and during trials could hardly be the major source of the system's failings. What, then, are the major sources?

Sara Podell is a freelance writer in Chicago.

Confronting the Drug Problem

Most analysts agree that one of the greatest challenges facing the criminal justice system is the nation's overwhelming drug problem. They also agree that not only do politicians and the public need to recognize that the drug problem cannot be addressed by law enforcement alone, but they must be willing to put forth money for a comprehensive program which includes treatment and education.

How much attention should be devoted to law-enforcement solutions? How should funding be divided between law enforcement and treatment and education? Should more money be invested in law enforcement? These are the hotly debated questions.

At both the national and local levels, governments are pouring a great deal of money into law enforcement. The findings of the Special Committee on Criminal Justice in a Free Society show that despite this high level of funding, "the drug problem in this country is severe, growing worse, and . . . law enforcement has been unable to control the problem." (*Criminal Justice in Crisis*, p. 44) A police lieutenant quoted in the committee's report comments: "There is no law enforcement solution to the problem . . . . It is ultimately a social problem." (*Criminal Justice in Crisis*, p. 45) Dash and Goretsky add that "the President's current war on drugs simply will not work and will only lead to more public disappointment, anger and frustration." (Dash and Goretsky, p. 4) While encouraged by President Bush's recognition that law enforcement alone cannot remedy the problem, they note that the President still allots only a small portion of available funds to education, treatment and other non-law enforcement programs.

Judge Reggie B. Walton, on the other hand, believes that the President's program is on the right track to solving the drug crisis. Judge Walton is associate director of the Office of National Drug Control Policy of the Executive Office of the President. He stresses that the President believes that education is the ultimate tool to overcoming this problem. Towards that goal, he says, the President has recommended that funding for drug education programs be increased by $37 million. He also states, "We will seek to beef up our law enforcement efforts so that we can go after more people and make them accountable for their illegal conduct." (Walton, "Why We Need to Win the War Against Drugs," *Update on Law-Related Education*, Winter 1990, p. 4)

The Word on the Street

There are similar disagreements on the local level as to how much money should be allocated to law enforcement's role in combating the drug problem. New York City is a prime example of how the push for more drug arrests has clogged cities' criminal justice systems. An April 1989 article in the *New York Times* stated that "the root of the crisis, many officials assert, was a decision last year by the Koch administration to allocate $116 million over two years for the politically popular Tactical Narcotics Teams (TNT), special teams intended to saturate designated areas with street level arrests." (Pitt, "Drug Cases Clog New York City Courts," *New York Times*, April 4, 1989, p. 24) Of this $116 million, $9.5 million—slightly more than 8%—was budgeted for the Legal Aid Society and the district attorneys.

However, district attorneys working in the TNT areas said this money would still be insufficient to cover the costs of dealing with the increasing number of felony drug cases. Most New York lawyers, judges and police agree that the city's system is so bogged down that many traffickers and users will end up back on the streets because there are not enough people or funds to process them. "I've been told by some [New York] judges, explains Samuel Dash, "that if someone charged with a felony jumps bail and doesn't show up in court they all celebrate and applaud." (Dash, "Can the Bill of Rights Survive the Crisis in Criminal Justice?" *Update on Law-Related Education*, Winter 1990, p. 9) And while the situation in New York may be severe, Manhattan District Attorney Robert Morgenthau reports that it's even worse in Miami, Los Angeles and Washington, DC.

Those who advocate a "get tough" policy on the streets believe that this is the best way to send the message that the government is serious about winning the war on drugs. Their opponents believe that massive arrests will be useless if the system is unable to process the suspects. Chief Judge Sol Wachtler emphasizes that "what is being lost is the certainty of punishment, which is even more important as a deterrent to crime than the severity." (Pitt, p. 24) An additional and often overlooked consequence is the demoralizing effect this "revolving door" has on police who must watch helplessly as suspects are returned to the streets.

Bulletin

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Richard Abell, former assistant attorney general in charge of the Office of Justice Programs, takes a contrary view. He stresses that "to most drug dealers the prospect of making millions far outstrips the risk of a three-year prison sentence with a chance of parole in 18 months. A 15-year mandatory sentence with no chance of parole would send a dramatically different message." (Abell, "The Costly Crisis in Corrections," *The Wall Street Journal*, March 21, 1989, p. A26)

Whether one chooses to stress certainty or severity of punishment to deter crime, suspects have the right to a trial. If they are convicted and sentenced to prison, there must be room for them in prison. This seems obvious, but the system is currently so starved for resources and personnel, and the prisons are so overcrowded, that vigorous law enforcement might cause the system to collapse before it could affect the drug trade.

The System's Imbalance

Regardless of one's position on the issue, one fact is inescapable: a lack of funds has weakened the justice system. In New York City, for example, the TNT allocation was made "without seeking a commensurate rise in state and city funds for the courts, the district attorneys, the city's Correction and Probation Departments, the Legal Aid Society and drug treatment centers and education programs." (Pitt, p. 24) Former Chief Justice Burger warned against this kind of imbalance when he compared the criminal trial process to a three-legged stool comprised of the judge, the prosecutor and the defense attorney. "The weakness of any one of the legs," he said, "will cause the process to tumble." (Dash and Goretsky, p. 4)

One example of this can be seen in the current use of plea negotiation. According to information collected by the Special Committee on Criminal Justice in a Free Society, plea bargaining is widely distrusted by the public. Although plea bargaining might strengthen the justice system under certain conditions, justice officials repeatedly told the committee that now "plea negotiation was essential because the system simply could not function if more defendants exercised the right to trial." (*Criminal Justice in Crisis*, p. 41) Thus there is a pressure to negotiate pleas even though this practice may not be in the best interest of either the public or the defendant.

In addition, the committee found that public defense services are plummeting in quality because the attorneys must take on more cases than they can handle. Prosecutors face the same problem. "We're swamped," explains Brooklyn District Attorney Elizabeth Holtzman. "We've got assistant district attorneys handling 120 cases each and Criminal Court judges dealing with 250 to 400 cases apiece." (Pitt, p. 24) Because of the number of cases on court dockets, suspects often must wait to be arraigned three to four times longer than they did in the past.

Prison Crowding

In view of the prison system's widely acknowledged problems, many question the strategy of fighting drug crimes with longer prison sentences. As American Bar Association President Jack Curtin observes, "[O]ur jails and prisons are bursting at the seams. Forty states are under court order for unconstitutional conditions in their correctional facilities." In many jurisdictions, Curtin notes, crowding is exacerbated by sentencing mandates which force judges to send first offenders, especially first-time drug offenders, to prison.

While new prisons are being built at an unprecedented rate—and at astronomical costs of between $50,000 and $100,000 per bed—new construction cannot keep pace with the rising rate of incarceration. Since 1970, the number of persons in state and federal prisons has tripled. A report from The Sentencing Project in Washington, DC indicates that the United States has the highest incarceration rate in the world.

One way to alleviate the crisis, according to some analysts, is through prison privatization. Under this arrangement, the government contracts with a private company to house and monitor prisoners. Private companies can often build and run prisons for less than the government, and still make a profit. Several such prisons have already been established in Texas, Kentucky and New Mexico.

Some question, however, whether saving money justifies handing over governmental responsibility for prisoners to a private entity. Edward Koren of the National Prison Project of the American Civil Liberties Union comments that the governments may not "always have the best interest of prisoners at heart, but at least they're accountable to the people. Who holds these companies accountable?" (Belkin, Rise of Private Prisons: How Much of a Bargain?", *New York Times*, March 27, 1989, p. 8) The ability of the government to insure the constitutional rights of prisoners in such facilities is a central issue in this debate.

One consequence of overcrowding, according to *Criminal Justice in Crisis*, is that parole boards are forced to release offenders too soon. "An inmate who serves 40% of his sentence has served a lot of time. . . . [I]f the public is upset, they are going to have to address the governor or the state authorities." (*Criminal Justice in Crisis*, p. 43) This type of request for support and action by the public is echoed by many of the people surveyed in all areas of the criminal justice system.

What the Public Can Do

Many observers believe that the public must first come to understand that the criminal justice system has a limited role in reducing crime. People must begin to see that the crime problem, whether related to drugs or not, is a societal problem that has its roots in both economic status imbalance and a weakened moral system. A Washington, DC high school student reacting to President Bush's "Say No to Drugs" speech said, "I make a hundred bucks an hour selling drugs. What does the President want me to do, work at McDonald's for the minimum wage?" (Dash, p. 9) "The public," says Dash, "unfortunately believes that

if the police worked honestly and competently they would protect them against crime. . . . It's impossible. It's impossible for the policeman on the street to solve the crime problem." (Dash, p. 8) When the public accepts this fact, perhaps it will realize that it can make important contributions to fighting the crime problem.

For example, communities can establish task forces to address the problems the criminal justice system faces and set priorities for government spending. Citizens can mobilize to demand greater funding for education, treatment, and the courts. Because much crime in America is committed by youth, many of those surveyed in *Criminal Justice in Crisis* emphasized their belief that "providing services for neglected, abused, and delinquent youth could have a significant impact on the incidence of crime." (*Criminal Justice in Crisis*, p. 53)

Educators also have an important role. They can invite judges, attorneys, legislators and justice system professionals to speak to students about the myths and realities of the criminal justice system. They can serve as crucial liaisons between the system and the community. Almost every analyst stresses that there is fragmentation not only within the system itself, but also in the relationship between the system and the nation it serves. Communication, therefore, is a vital first step towards establishing a foundation of knowledge upon which effective, lasting and just solutions can be built.

Publications and Information Resources

Publications listed below are free unless otherwise stated.

American Civil Liberties Union
132 West 43rd St., New York, NY 10036
(212) 944-9800

American Correctional Association
8025 Laurel Lakes Ct., Laurel, MD 20707
Call (800) 825-BOOK for publications information.

Criminal Justice is a magazine published by the American Bar Association's Criminal Justice Section; to order write or call: American Bar Association, Order Fulfillment 161, 750 N. Lake Shore Drive, Chicago IL 60611
(312) 988-5555 ($33/yr., $8 per copy)

Criminal Justice in Crisis is the report prepared by the Special Committee on Criminal Justice in a Free Society. For a free copy, contact American Bar Association, Order Fulfillment 161, 750 N. Lake Shore Drive, Chicago IL 60611
(312) 988-5555

Criminal Justice Public Education Project is the follow-up to ***Criminal Justice in Crisis***. For more information, contact Susan Hillenbrand, American Bar Association, Criminal Justice Section, 1800 M Street, N.W., Washington, DC 20036.

The National Criminal Justice Reference Service (NCJRS) offers hundreds of publications, including:

The National Assessment Series, a group of five articles which address different problems in criminal justice

Drugs and Crime Facts 1989, a primarily statistical report on the relationship between drugs and crime.

For more information, contact National Criminal Justice Reference Service, Box 6000, Rockville, MD 20850; (800) 851-3420

Report to the Nation on Crime and Justice, 2nd ed., 1988, provides statistical information in a format easily understood by a non-technical audience, with many excellent charts and graphs. To order, contact Bureau of Justice Statistics (BJS), 633 Indiana Ave., N.W., Washington, DC 20531; (202) 724-7774

Update on Law-Related Education addresses diverse issues in the teaching of law-related education including the crisis in criminal justice. To order, contact American Bar Association, Order Fulfillment 161, 750 N. Lake Shore Drive, Chicago IL 60611; (312) 988-5555 ($14.95/yr., $6.00 per copy).